FILE COPY

Office Supreme Court, U
FILED
FEB 12 1929
CHARLES ELMORE CRO
CL

IN THE

Supreme Court of the United States

OCTOBER TERM,

No. 574. 15

WHEELER LUMBER BRIDGE & SUPPLY COMPANY,
vs.
UNITED STATES OF AMERICA.

BRIEF FOR WHEELER LUMBER BRIDGE & SUPPLY CO.

JESSE I. MILLER,
Attorney for Wheeler Lumber Bridge & Supply Company.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Statement of Facts	1-3
Question Certified	3
Argument	4-15
Conclusion	16

POINTS AND AUTHORITIES.

I. Plaintiff was not liable for the tax under Section 502 of the Revenue Act of 1917 or Section 500 (h) of the Revenue Act of 1918.... 4-8

Sections 500, 501 and 502, Revenue Act of 1917.

Sections 500 (h) and 501, Revenue Act of 1918.

City of Wichita Falls v. United States, 62 Ct. Cls. 239; writ of certiorari denied 273 U. S. 750.

II. The Shipments were exempt under Panhandle Oil Company v. Mississippi 8-16

Panhandle Oil Co. v. Mississippi, 277 U. S. 218.

Flint v. Stone-Tracy Co., 220 U. S. 107; 55 L. ed. 389.

Kennett, Parochial Antiquities, 46.

Blackstone (Sharswood) 1 Comm. 356.

Washer v. Bullitt County, 110 U. S. 558; 28 L. ed. 249.

13 Ruling Case Law, 79.

Federal Aid Road Act of 1916 (39 Stat. 355).

IN THE

Supreme Court of the United States

OCTOBER TERM,

No. 571.

WHEELER LUMBER BRIDGE & SUPPLY COMPANY,

vs.

UNITED STATES OF AMERICA.

BRIEF FOR WHEELER LUMBER BRIDGE & SUPPLY CO.

This case is before the Court upon a certificate of the Court of Claims for instructions on the question of law hereinafter stated, arising out of the following.

FACTS.

During the years 1918, 1919, 1920, and 1921, the Wheeler Lumber Bridge & Supply Company (plaintiff below) sold certain quantities of lumber to nine counties in the State of Nebraska and one county in the State of Iowa, the said lumber having been purchased by said counties for the purpose of building and re-

pairing bridges in their respective public highways. Such repairing and building were in all cases performed entirely and directly by employees of the said county governments. (R. pp. 1-4.)

Prior to making these sales, plaintiff advised the Collector of Internal Revenue at Dubuque, Iowa, of the manner in which it was contemplated that lumber would be sold and shipped and requested information as to whether or not there would be, under the circumstances hereinafter detailed, any liability for the transportation tax then in effect. (R. pp. 14-17.)

The Collector advised the Company that if "the shipment is intended to be used directly for the county," no transportation tax liability would attach. (R. p. 17.)

Thereupon, plaintiff entered into the various contracts referred to above. Its salesmen obtained the orders for said lumber from the County Commissioners or the Boards of County Supervisors, the prices agreed upon in each instance being f. o. b. at points of delivery. The lumber was then shipped from Southern or Pacific points to the various counties and was consigned to plaintiff or its order at destination. Freight bills and invoices covering the shipments were forwarded to the respective county clerks by plaintiff and, upon arrival of the shipments, said clerks would present the freight bills to the carrier, pay the freight, obtain receipted freight bills and accept the shipments. The county clerks then deducted the amount of the freight charges from the invoices and forwarded to plaintiff the receipted freight bills and checks for the balances of the invoices. In each instance, the amount of the checks plus the freight bills totaled the price which the county had contracted to pay for the lumber.

No transportation tax was collected from the county

clerks by the carriers on any of these shipments. However, after settlement had been made with plaintiff by all the county governments, the Collector compelled plaintiff to pay the tax alleged to have been due on each shipment.

Suit to recover these taxes having been brought in the Court of Claims, that Court, being in doubt as to the proper disposition of the issues of law involved, has certified the following question to this Court for instruction:

> "QUESTION: Where lumber is purchased by a county from a private corporation for the purpose of repairing or building, directly through its own employees, bridges in said county, said lumber to be delivered f. o. b. at a specified point and said lumber is shipped from various points consigned to the plaintiff or to the order of the shipper and payment of the freight charge is made by the county clerk of said county and the amount thereof deducted from the invoice price of said lumber, the balance of said invoice being later remitted by said county clerk to the plaintiff, are the services rendered in the transportation of said lumber rendered to said county within the provisions of Section 502 of the Revenue Act of 1917 (40 Stat. 314, 315) and Section 500 (h) of the Revenue Act of 1918 (40 Stat. 1101, 1102) and the decision of the Supreme Court of the United States in said case of the *Panhandle Oil Company v. State of Mississippi*, 277 U. S. 218." (R. p. 4.)

Separating this query into its component parts, it appears to involve the determination of two questions:

(1) Was plaintiff liable for the transportation tax under Section 502 of the Revenue Act of 1917 and Section 500 (h) of the Revenue Act of 1918, and, if so,

(2) Were the shipments exempt from the tax under the principle laid down by this Court in *Panhandle Oil Company vs. Mississippi, supra*?

I.

WAS PLAINTIFF LIABLE FOR THE TAX UNDER SECTION 502 OF THE ACT OF 1917 AND SECTION 500 (h) OF THE ACT OF 1918?

The material provisions of law here involved are Sections 500, 501, and 502 of the Revenue Act of 1917 and Section 500 and 501 of the Revenue Act of 1918 which are set out in the margin.* Since the provisions of both Acts are substantially the same, with the exception of the arrangement of the several pertinent pro-

---

Revenue Act of 1917.

"Section 500. That from and after the 1st day of November, 1917, there shall be levied, assessed, collected and paid (a) a tax equivalent to 3% of the amount paid for the transportation by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water of property by freight consigned from one point in the United States to another. * * *

"Section 501. That the taxes imposed by Section 500 shall be paid by the person, corporation, partnership, or association paying for the services or facilities rendered.

"Section 502. That no tax shall be imposed under Section 500 upon any payment received for services rendered to the United States, or any state, territory, or the District of Columbia. The right to exemption under this Section shall be evidenced in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation prescribe."

Revenue Act of 1918.

"Section 500. That from and after April 1, 1919, there shall be levied, assessed, collected and paid in lieu of taxes imposed by Section 500 of the Revenue Act of 1917—(a) a tax equivalent to 3% of the amount paid for the transportation on or after such date, by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water of property by freight transported from one point in the United States to another. * * *

"(h) No tax shall be imposed under this section upon any payment received for services rendered to the United States or to any State or Territory or the District of Columbia. The right to exemption under this subdivision shall be evidenced in such manner as the Commissioner with the approval of the Secretary, may by regulation prescribe."

"Section 501. (a) That the taxes imposed by Section 500 shall be paid by the person paying for the services or facilities rendered."

visions, all following references will be, for purposes of brevity, to the 1918 Act.

Section 500 imposes a tax of 3 per cent on the amount of all transportation charges on shipments by freight within the United States. Subsection (h) provides, however, that no tax shall be imposed upon any payment received "for services rendered to the United States or to any State or Territory, or the District of Columbia." Section 501 provides that the tax imposed by Section 500 "shall be paid by the person paying for the services * * * rendered."

It will be observed, therefore, that the liability for the tax is imposed upon "the person *paying for* the services," but that tax shall not be imposed upon "services rendered to * * * any state * * *."

It will be remembered that the lumber in question was shipped f. o. b. destination, consigned to plaintiff or its order at destination. The government contends that, under these conditions, the services, *as a matter of law*, were rendered to the shipper and not to the county government. For present purposes, this proposition may be conceded.

Even if this be true, however, plaintiff did not become liable for the tax. That liability is imposed upon "the person *paying for* the services," and not upon the person for whom the services are rendered.

If these services were rendered to the state, they were exempt from the tax; but if they were not so rendered and were not exempt, the liability still remained upon "the person paying for the services."

In the case at bar, plaintiff contends that the county government, was in each instance, "the person paying for the services" within the meaning of the Act, and that such county government, and not plaintiff, was

liable, if any liability existed. The government contends that the transportation charges were paid by the county government out of moneys belonging to plaintiff, and that plaintiff was therefore, "the person paying for the services."

The government's contention here is obviously unsound and is directly opposed to the interpretation placed upon the law by the Treasury Department's own regulations.

Treasury Department Regulations No. 49 (Revised) promulgated January 17, 1920, provided, by Article 110 thereof, that—

> "All taxes imposed by Section 500 shall be paid by the person *from whom or from which the carrier collects the charges for the services* or facilities rendered. The method of adjusting transportation expenses between the buyer and seller, or the consignor and the consignee *is a matter of private contract over which the Government has no jurisdiction.*" (Italics ours)

This regulation laid down the only possible rule for the collection of the transportation tax. The tax was imposed by the Act and by the Treasury Department's construction of it upon the "person paying for the services" that is, upon the person "from whom or from which the carrier collects the charges for the services or facilities rendered."

The carriers, upon which was imposed the burden of collecting the tax, could not possibly administer this part of the Act unless the tax was collected from the person *actually paying the transportation charges.* The carriers could not be and were not expected to hold a judicial inquiry over every bill of lading pre-

sented for the purpose of determining the person to whom the services, as a matter of law, were rendered.

The Act, therefore, imposed the liability directly upon the person *from whom the carrier collected the charges.* It seems most untimely that, at this late date, the government should contend for a contrary construction.

The county governments, in the case at bar, were the persons "from which the carrier collected the charges" and they are the persons "*paying for* the services" and liable for the tax, if any liability existed.

It is pertinent here to refer to the case of *City of Wichita Falls v. United States,* 62 Ct. Cls. 239 (writ of certiorari denied, 273 U. S. 750). In that case the contractual arrangement between the city and the shipper was substantially identical with that in the case at bar. There the government asserted liability *against the city which had actually paid the freight charges,* and not against the shipper which had sold the goods at an agreed delivered price. In the case at bar, however, the government seeks to reverse this order and to hold the shipper liable under the same conditions under which, in the *Wichita Falls* case, the consignee was held liable. This, it is submitted, it cannot do, regardless of the construction that may be put upon Section 500 (h).

That section grants an exemption from tax when the services are rendered to the state. Its purpose, obviously, is to recognize by statute the exemption which already existed under the Federal Constitution. The statute cannot narrow or curtail the constitutional right. In its last analysis, therefore, the right to exemption in the case at bar is at least as comprehensive as the Constitution guarantees.

This court, in *Panhandle Oil Company vs. Mississippi, supra*, has defined the scope of that exemption. Its application to the case at bar is, therefore, necessary.

II.

WERE THE SHIPMENTS EXEMPT UNDER PANHANDLE OIL COMPANY VS. MISSISSIPPI?

Since the decision in the *Panhandle Oil* case is, in counsel's opinion, decisive of the case at bar, it will now be analyzed.

In that case, it appeared that a statute of Mississippi provided that

> "any person engaged in the business of distributing gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of 1 cent per gallon upon the sale of gasoline,"

with certain exceptions not here material.

Since the enactment of that statute in 1922, the Panhandle Oil Company had been engaged in the distribution of gasoline. The State of Mississippi sued to recover taxes claimed on account of sales made by the Oil Company to the United States for the use of its Coast Guard fleet in service in the Gulf of Mexico and its Veteran's Hospital at Gulfport. The Company defended on the ground that the statute, if construed to impose taxes on these sales, was repugnant to the Federal Constitution.

The Supreme Court of Mississippi held the tax valid on the ground that it was a privilege tax on the dealer, measured by the number of gallons of gasoline sold

and it was, therefore, not a tax on any instrumentality of the Federal Government.

In reversing the case, this Court said:

> "While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the state, *it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes.*
>
> The validity of the taxes claimed is to be determined by the practical effect of enforcement in respect of sales to the government. Wagner v. Covington, 251 U. S. 95, 102, 64 L ed. 157, 167, 40 Sup. Ct. Rep. 93. A charge at the prescribed rate is made on account of every gallon acquired by the United States. *It is immaterial that the seller and not the purchaser is required to report and make payment to the state. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests.* The amount of money claimed by the state rises and falls precisely as does the quantity of gasoline so secured by the government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States, of its constitutional powers to operate the fleet and hospital. * * * *To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale.* * * * And that is to tax the United States—to exact tribute on its transactions and apply the same to the support of the state." (Italics ours.)

The position of this Court, as disclosed by the foregoing language, is unmistakable. Regardless of any technical liability for the tax, the court holds that ex-

cises of the sort there involved necessarily place a burden upon the transaction which, as a practical matter, is ultimately borne by the purchaser. Thus, this court held that a state, *"may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes."*

This principle is obviously reciprocal. The same fundamental reasons which prohibit the state from imposing the burden of its tax upon the Federal government operate to preclude the Federal government from laying a similar burden on the state.

Paraphrasing the language of this court, it may, therefore, be confidently stated that *"the Federal government may not lay any tax upon transactions by which the state secures the things desired for its governmental purposes."*

In the case at bar, the statute laid a tax upon the transportation of articles by freight. The county governments entered into transactions looking toward securing lumber to repair bridges in their public highways. The United States asserted the tax upon the idea that it was payable by the vendor and hence no burden fell upon the County government. That fact, however, is immaterial. This court has said "Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests." "The necessary operation" of the tax was to pass the burden to the purchaser.

This is particularly apparent in the case at bar. Before making any sales to the county governments, plaintiff sought the advice of the Collector of Internal Revenue to determine whether a tax would attach to the shipments. When it was advised that no tax would attach it quoted certain delivered prices to the county

governments. Can it be doubted that if the Collector had indicated that a tax would have to be paid, the county governments would have purchased the lumber as cheaply as they did?

Hence, *both as a matter of law and as a matter of fact*, the burden of tax fell upon the counties in these transactions. If they were entered into for the purpose of securing "the things desired for governmental purposes" they were clearly exempt.

It is necessary, therefore, only to determine whether the maintenance of bridges in their public highways was the exercise of a *governmental function* by the several county governments here involved, or whether that function was of such a quasi-private nature as to destroy the exemption.

"The true distinction"

said this court in *Flint vs. Stone-Tracy Co.*, 220 U. S. 107; 55 L. ed. 389, 422,

> "is between the attempted taxation of those operations of the state essential to the execution of its governmental functions, and which the state can only do itself, and those activities which are of a private character. The former, the United States may not interfere with by taxing the agencies of the state in carrying out its purposes; the latter, although regulated by the state, and exercising delegated authority, such as the right of eminent domain, are not removed from the field of legitimate Federal taxation."

Is the maintenance of a bridge in a public highway an *act of government*, one "which the state can only do itself" or is it of such a quasi-private nature as to take it out of the category of governmental function?

It will be seen that the maintenance of public bridges and of public highways in general is not only a function of government today but that it is one of the most ancient of all functions of government and has always inhered, as such, in Anglo-Saxon jurisprudence.

The government of Rome was built upon its public roads. One of the vital functions of the Roman state was the maintenance of its military highways. No man, under Roman law, was exempt from the obligation to labor or contribute labor in the construction and repair of roads and bridges.

The same obligation was recognized by ancient Saxon law. Service in repairing bridges was a part of the *trinoda necessitas*—the threefold necessary public duties to which all lands were liable, viz.: for repairing bridges, for maintaining castles or garrisons, and for expeditions to repel invasion. In the immunities enumerated in the king's grants, these words were always encountered: *"exceptis his tribus, expeditione, pontis et arcis constructione"*. Kennett, Parochial Antiquities, 46.

The same obligation is noted by Blackstone (Sharswood I Com. 356). Thus:

> "Every parish is bound of common right to keep the highroads that go through it in good and sufficient repair; unless by reason of the tenure of lands, or otherwise, this care is consigned to some particular private person. From this burthen no man was exempt by our ancient laws, whatever other immunities he might enjoy; this being part of the *trinoda necessitas,* to which every man's estate was subject; viz., *expeditio contra hostem, arcium constructio, et pontium reparatio.* For, though the reparation of bridges only is expressed, yet that of roads also must be understood; as in the

Roman law, *ad instructiones reparationesque itinerum et pontium, nullum genus hominum, nullius-que dignitatis ac venerationis meritis, cessare oportet.* And indeed now, for the most part, the care of the roads only seems to be left to parishes, that of bridges being in great measure devolved upon the country at large by statute 22 Hen. VIII. c. 5. If the parish neglected these repairs, they might formerly, as they may still, be indicted for such their neglect: but it was not then incumbent on any particular officer to call the parish together and set them upon this work: for which reason, by the statute 2 & 3 Ph. and M. c. 8, surveyors of the highways were ordered to be chosen in every parish.

* * * * * * * *

"They (surveyors of the highways) are to call together all the inhabitants and occupiers of lands, tenements, and hereditaments within the parish, six days in every year, to labour in fetching materials, or repairing the highways: all persons keeping draughts (of three horses, etc.) or occupying lands, being obliged to send a team for every draught, and for every 50 £ a year which they keep or occupy; persons keeping less than a draught, or occupying less than 50 £ a year, to contribute in a less proportion; and all others persons chargeable, between the ages of eighteen and sixty-five, to work or find a labourer."

These earliest of personal obligations to the state, viz.: service in the army, in the fortress, and on the roads and bridges—flowed from the corresponding recognized functions of government, viz.: to raise armies, to maintain fortresses and to preserve intact the public highways and bridges.

The history of Anglo-Saxon law reveals no departure from this concept. The maintenance of public

bridges and highways is still one of the recognized functions of government. Thus, this court said in *Washer v. Bullitt County*, 110 U. S. 558, 28 L. ed. 249, 251, quoting from *Hamilton Co. v. Mighels*, 7 Ohio St. 109:

> "A county is created almost exclusively with a view to the policy of the State at large, for purposes of political organization and civil administration in matters of finance, education, provision for the poor, military organization, and of *means of travel and transportation*," etc. (Italics ours)

In *Atkin vs. Kansas*, 191 U. S. 207, 48 L. ed. 149, 157, this Court said:

> "The improvement of the boulevard in question was a work of which the state, if it had deemed it proper to do so, could have taken immediate charge by its own agents; for it is *one of the functions of government to provide public highways for the comfort and convenience of the people.* Instead of undertaking that work directly, the state invested one of its governmental agencies with power to care for it.
>
> Whether done by the state directly or by one of its instrumentalities, *the work was of a public, not private character.*" (Italics ours)

The same principle is stated in Ruling Case Law as follows:

> "The opening, construction and maintenance of public highways *is purely a governmental function* * * *,*"

citing numerous cases. 13 R. C. L. 79.

Within the past fifteen years the public character of road maintenance has been tremendously empha-

sized. With the unprecedented development of motor transportation within that period has come an era of road building which has assumed not only a local but a national significance. Beginning with the Federal Aid Road Act of 1916 (39 Stat. 355), the Federal government has launched a campaign of cooperation with the several states for the purpose of creating a system of national highways jointly maintained by the federal and local governments. See Acts of February 28, 1919 (40 Stat. 1200); November 9, 1921 (42 Stat. 212); June 19, 1922 (42 Stat. 660); January 22, 1923 (42 Stat. 1157); February 26, 1923 (42 Stat. 1321); March 10, 1924 (43 Stat. 17); June 5, 1924 (43 Stat. 460); February 10, 1925 (43 Stat. 852); February 12, 1925 (43 Stat. 889); May 11, 1926 (44 Stat. 530); January 18, 1927 (44 Stat. 1006); May 16, 1928 (Pub. 392—70th Congress); May 26, 1928 (Pub. 519—70th Congress).

The execution of this new scheme can scarcely be said to be quasi-private in its nature.

It may be safely stated, therefore, that since the written record began, it has been fundamental in Anglo-Saxon law that one of the functions of government has been the construction and maintenance of public bridges and highways and that these earliest of concepts not only have remained intact but that within recent years have taken on an added significance.

It would seem scarcely necessary to have elaborated this proposition save for the fact that it was suggested below that the construction and repair of the bridges by the county governments was not the exercise of a governmental function of the sort which would justify the exemption from the transportation tax. It

is believed that the foregoing fully and conclusively destroys any such suggestion.

CONCLUSION.

It is, therefore, submitted that the construction and repair of the bridges here involved by the county governments was the exercise of a governmental function and that the transactions whereby those county governments secured the lumber desired for such work were exempt from the transportation tax.

Respectfully submitted,

JESSE I. MILLER,
Attorney for Wheeler Lumber Bridge & Supply Company.